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No. 00-860

In the Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION, PETITIONER

v.

JOHN E. MALESKO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a private corporation operating a Community Corrections Center that houses and provides services to federal prisoners under a contract with the Bureau of Prisons is subject to suit under the implied damages action this Court recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

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INTEREST OF THE UNITED STATES

This case concerns whether a private corporation that operates a correctional facility for federal prisoners is subject to suit under the cause of action for damages this Court recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Petitioner is a private company that, under contract with the Bureau of Prisons (BOP or Bureau), operates Community Corrections Centers and other facilities for federal prisoners. Respondent was a prisoner housed in such a facility. Congress has authorized the Attorney General to contract with public and private entities to house and provide support for prisoners in Community Corrections Centers. See, *e.g.*, 42 U.S.C. 13901. In addition, Congress has authorized the placement of certain prisoners in secure correctional facilities that are privately operated. See, *e.g.*, National Capital Revitalization and Self-

Government Improvement Act of 1997, Pub. L. No. 105-33, Subtit. C, § 11201(c), 111 Stat. 734. The Immigration and Naturalization Service and the United States Marshals Service, like the BOP, also contract with private firms for detention services. See, *e.g.*, 18 U.S.C. 4013. The United States has an interest in the extent to which the entities with which it contracts are exposed to liability under *Bivens* for the allegedly unconstitutional conduct of their agents, as well as in ensuring proper deterrence of and appropriate remedies for such conduct.

STATEMENT

1. Private organizations have long played a role in the operation of correctional facilities. As this Court has observed, "[p]rivate individuals operated local jails in the 18th century," and "private contractors were heavily involved in prison management during the 19th century." *Richardson* v. *McKnight*, 521 U.S. 399, 405 (1997). One of the most significant roles for private organizations in adult corrections has been in the provision of community-based correctional facilities, such as halfway houses, designed to help prisoners re-integrate into society. In fact, private organizations such as "[c]oncerned citizens and religious groups established the first halfway houses and group homes for adult offenders," and "significant community corrections programs, including probation, were started in the same manner." Bowman, Hakim, & Seidenstat, *Privatizing Correctional Institutions* 116 (1992). See also *id.* at 7, 118 (noting the "long * * * established * * * use of private contracts * * * to operate various forms of programs and services, including halfway houses, work release programs, prerelease centers, group homes, and treatment centers for alcohol and drug offenders"). See also McDonald et al., *Private Prisons in the United States* 5 (1998) (study required by Pub. L. No. 105-277, § 111, 112 Stat. 2681-67).

For nearly half a century, the Bureau of Prisons has placed federal prisoners in halfway houses and similar facilities (now called "Community Corrections Centers") to assist them in making a successful transition from confinement to liberty. The placement of probationers and parolees in such facilities was originally a discretionary matter.[1] However, in 1984, Congress enacted 18 U.S.C. 3624 to provide for more extensive use of such facilities. In relevant part, Section 3624(c) provides:

> [T]he Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term * * * under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's reentry into the community.

18 U.S.C. 3624(c).

Consistent with Section 3624, the BOP generally places eligible "inmates who are nearing their release date" in a Community Corrections Center, where they receive employment assistance, counseling, and supervision. See Bureau of Prisons, *Community Corrections Manual*, Program Statement 7300.09, § 1.2 (Jan. 2, 1998) (*Community Corrections Manual*) (*available* http://www.bop.gov/progstat/7300_09.pdf). In addition, the BOP employs such facilities as an alternative to "institutional confinement for certain short-term offenders" and as "a structured environment for [those] probationers, parolees, and supervised releasees who need more assistance and supervision than" would otherwise be available. *Ibid.*; see also *id.* § 4.1.2.

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[1] See 18 U.S.C. 4203 (1970) (providing that the Parole Board could require a federal parolee "to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of parole"); 18 U.S.C. 3651 (Supp. II 1972) (permitting court to impose same conditions on probationers).

Since the late 1960s, the BOP has contracted with private for-profit and not-for-profit companies to operate Community Corrections Centers to help federal prisoners reintegrate into society. McDonald, *supra*, at 5. The Bureau has not itself operated such facilities since 1981; instead, it relies exclusively on contracts with not-for-profit institutions, state and local governments, and private for-profit organizations.[2] The Bureau's *Community Corrections Manual* establishes an extensive program of pre-contract inspections and post-contract performance monitoring, evaluation, and correction, *Community Corrections Manual* §§ 4.4.2, 4.5.5 to 4.5.14, to ensure that contractors provide a safe, controlled environment with programs that help offenders become law-abiding citizens. See Bureau of Prisons, *Statement of Work for Community Corrections Center* 1 (Dec. 2000) (*BOP Statement of Work*) (*available* http://www.bop.gov/ccdpg/ccdccc.pdf). The Bureau conducts full monitoring—"a thorough, comprehensive review of the contractor's operation"—at regular intervals, and interim or spot-check examinations more frequently. *Community Corrections Manual* § 4.5.6.1. The BOP examines, among other things, the center's personnel, *id.* § 4.5.7.2, its facility (with an emphasis on safety, sanitation, and environmental health), *id.* §§ 4.5.7.3 to 4.5.7.4, and its provision of programs in areas such as employment, housing and substance abuse, *id.* § 4.5.7.6. The Bureau also offers its contractors training and management assistance to "increase the quality of contract corrections provided to Federal inmates." *Id.* § 4.5.8. The BOP's Administrative Remedy Program, 28

[2] For example, the Bureau contracts not only with for-profit entities like petitioner, but also with charitable organizations like Volunteers of America (which operates facilities in Indiana, Louisiana, Maryland, Minnesota, New York, and Texas), the Salvation Army (Arkansas, Florida, Illinois, North Carolina, Tennessee, and Texas), Progress House Association (Oregon), Triangle Center (Illinois), and Catholic Social Services (Pennsylvania).

C.F.R. 542.10, is open to prisoners residing in contract Community Corrections Centers.

2. Petitioner Correctional Services Corporation (CSC) had operated the Le Marquis Community Correctional Center in New York under a contract with the BOP since the late 1980s. Respondent John Malesko is a former federal inmate who, after his conviction for federal securities fraud in December of 1992, was sentenced to a term of incarceration of eighteen months. While in the custody and care of the BOP, respondent was diagnosed with a heart condition and treated with prescription medication. As respondent neared his release date, the BOP transferred him to the Le Marquis halfway house for the remainder of his sentence, as contemplated by 18 U.S.C. 3624(c). Pet. App. 2a; J.A. 10-11.

According to his complaint, respondent was assigned to living quarters on the fifth floor at Le Marquis. Respondent alleges that, on or about March 1, 1994, CSC instituted a policy requiring inmates residing below the sixth floor to use the staircase rather than the elevator to travel from the first-floor lobby to their rooms. Respondent claims that, despite that alleged policy, CSC staff permitted him to use the elevator because they knew of his medical condition. He claims, however, that CSC employee Jorge Urena prevented him from using the elevator to go to his fifth-floor room on March 28, 1994. Pet. App. 2a-3a; J.A. 11. According to respondent, Urena directed him to use the staircase, even though respondent reminded Urena of his heart condition. While climbing the stairs, respondent suffered a heart attack and fell. J.A. 12. He alleges that the fall aggravated a pre-existing "injury to his *left* ear," causing a loss of equilibrium, and that he endured bruising, pain and suffering as well. *Ibid.* Respondent also claims that approximately ten days before that incident, he had run out of the medication

prescribed for his heart condition, and that CSC had failed to replenish it. Pet. App. 3a; J.A. 12.[3]

3. Almost three years later, on March 27, 1997, respondent filed a pro se action against CSC and unnamed CSC employees in the Southern District of New York, claiming that they had violated his rights. In 1999, respondent, with counsel, filed an amended complaint which was identical to the initial complaint in all material respects, except one: for the first time, the complaint specifically named as a defendant Urena, the CSC employee who had allegedly barred respondent from using the elevator. Pet. App. 3a.

The district court dismissed the amended complaint. The court treated the complaint as raising claims under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Relying on this Court's decision in *FDIC* v. *Meyer*, 510 U.S. 471, 483-486 (1994), the district court held that CSC, as a private corporation, is not subject to suit under *Bivens*. Pet. App. 21a. The district court dismissed the complaint with respect to Urena on statute of limitations grounds. *Id.* at 22a-24a.

4. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-18a. The court of appeals affirmed dismissal of respondent's claims against Urena as barred by the statute of limitations. *Id.* at 15a-18a. Respondent has not sought further review of that ruling, and it is no longer at issue in this case.

With respect to CSC, however, the court of appeals reversed the district court's judgment of dismissal. See Pet. App. 5a-15a. The court of appeals observed that, in *FDIC* v. *Meyer*, *supra*, this Court had declined "to expand the category of defendants against whom *Bivens*-type actions may be brought to include not only federal agents, but federal

[3] Under the BOP's contracts, residents are generally responsible for the costs of their medical and dental care, although facilities are required to ensure proper medical treatment "[i]n an emergency." See *BOP Statement of Work* 88.

agencies as well." Pet. App. 6a (quoting *Meyer*, 510 U.S. at 484 (emphasis omitted)). The court of appeals also noted that, in *Kauffman* v. *Anglo-American School of Sofia*, 28 F.3d 1223 (1994), the D.C. Circuit had relied on *Meyer*'s reasoning in refusing to extend *Bivens* actions to private corporations like CSC. Pet. App. 7a. The court of appeals, however, declined to follow *Kauffman*, attempted to distinguish *Meyer*, and followed the Sixth Circuit's decision in *Hammons* v. *Norfolk Southern Corp.*, 156 F.3d 701 (1998), which had concluded that private corporations acting under color of federal law are subject to suit under *Bivens*. Pet. App. 10a.

Although the court of appeals acknowledged that this Court in *Meyer* had refused to recognize a *Bivens* action that would not deter wrongdoing by individual government agents and would result in an increased financial burden for the government, the court of appeals stated that *Meyer* does not control the outcome here. The court reasoned that, "even absent a substantial deterrent effect, an extension of [*Bivens*] liability [is] warranted * * * in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations." Pet. App. 10a. The court of appeals also hypothesized that extending *Bivens* liability to corporations might promote deterrence: "Even assuming a plaintiff would decline to sue the offending employee and sue only the employer, we believe that an employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees." *Id.* at 11a. The court of appeals also acknowledged that private contractors would pass on the increased costs associated with *Bivens* actions to the federal government. *Ibid.* But the court was of the view that this Court's decision in *Meyer* was primarily concerned with the financial burdens caused by "imposing *Bivens* liability directly upon federal agencies." *Ibid.*

Finally, the court of appeals stated that its decision was "influenced strongly by the law governing § 1983 claims."

Pet. App. 12a. In the context of Section 1983 actions, the court of appeals stated, this Court had recognized that private corporations engaging in state action may be liable. *Ibid.* (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-937 (1982)). The court saw "no reason not to incorporate that law into the *Bivens* context and permit suits against private corporations engaging in federal action." *Ibid.*

SUMMARY OF ARGUMENT

A. In 1971, in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, this Court recognized an implied private damages action under the Fourth Amendment against federal officers. In recognizing that right of action, the Court acknowledged that Congress had not provided a damages remedy against federal officers. 403 U.S. at 397. And the Court observed that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation." *Id.* at 396. Nonetheless, relying on the Court's then-existing precedents regarding implied private rights of action under federal statutes, see *id.* at 397 (citing *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)), the Court concluded that it had authority to create a damages remedy under the Fourth Amendment itself. In recognizing that damages action, the Court specifically relied on, *inter alia*, the deterrent effect on federal officers, the absence of any other available federal remedy under the circumstances, and the lack of special circumstances counseling hesitation in the face of congressional silence. In recent times, however, the Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988).

B. Caution is particularly warranted here. Respondent seeks not one but two extensions of the limited damages remedy recognized in *Bivens*. First, respondent requests that *Bivens* be extended to permit federal prisoners housed

in private correctional institutions to bring suits against *private* parties acting under color of federal law. Second, he asks that *Bivens* be extended so that those prisoners may seek damages not merely from the *individuals* who violate their constitutional rights, but also from the correctional *institution* that employs those individuals. That second extension would give prisoners in private correctional facilities a federal *Bivens* damages remedy that their counterparts in federally operated facilities do not possess. In light of *FDIC* v. *Meyer*, 510 U.S. 471 (1994), prisoners in BOP-operated facilities can sue individual BOP employees for constitutional violations, but they have no *Bivens* action against the correctional facility or the BOP itself. Nothing in *Bivens*' rationale suggests that a prisoner in a *private* facility should have a federal cause of action for damages against the correctional institution itself when his counterparts in BOP-operated facilities do not.

The logic of *Bivens* itself, moreover, counsels against the extension of *Bivens* that respondent seeks. Like the proposed extension this Court rejected in *Meyer*, respondent's proposed cause of action would give prisoners an incentive to sue the correctional corporation *rather than* the individual officers directly responsible for the constitutional violation. It thus would, like the extension the Court rejected in *Meyer*, undermine "the purpose of *Bivens*," which is "to deter *the officer*," 510 U.S. at 485. The decision to recognize a damages remedy in *Bivens*, moreover, rested in part on necessity; absent a judicially crafted remedy, there would have been no remedy for the constitutional violation. *Id.* at 484. Here, federal prisoners in private institutions have extensive remedies even absent the extension of *Bivens* that respondent seeks. In addition, because the BOP exercises extensive oversight over the private facilities with which it contracts, there is little reason why those facilities should be treated differently for *Bivens* purposes than the facilities the BOP operates itself.

C. Further considerations also counsel hesitation here. Recognizing an additional *Bivens* damages action directly against correctional corporations in this context has the potential of impeding the BOP's implementation of important correctional programs—programs that long have been provided exclusively through contracts with private facilities, and that Congress has statutorily encouraged the BOP to pursue. In addition, because the government cannot be held directly liable under *Bivens* when it provides correctional services itself, imposing liability on private providers of correctional services that step into the BOP's shoes under contract could distort the choice between contracting out and providing services in house. Such choices should be made in light of efficiency and the quality of services offered. They should not be influenced by the unnecessary judicial imposition of direct liability and thus increased costs on one source (private facilities) that the other source (the government) does not confront.

D. Finally, the court of appeals erred in relying on the scope of liability under 42 U.S.C. 1983. Section 1983 is a *statute*, and the scope of liability under it is a question of Congress's intent. As a result, this Court has construed Section 1983's scope in light of its specific language and unique legislative history. Those considerations have no application to the judicially crafted *Bivens* cause of action. Instead, this Court must consult the same broad considerations of policy that led to the judicial recognition of a limited damages action in *Bivens* itself. Those considerations counsel against the extension of *Bivens* liability that respondent seeks, and the extension should be rejected.

ARGUMENT

THE IMPLIED DAMAGES ACTION RECOGNIZED IN *BIVENS* DOES NOT PROPERLY EXTEND TO PRIVATE ENTITIES OPERATING CORRECTIONAL FACILITIES UNDER FEDERAL CONTRACT

In this case, respondent invites this Court to extend the implied damages remedy recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), so that federal prisoners housed in privately run correctional facilities may seek damages not only from the individuals who violate their constitutional rights, but also from the correctional institution employing those individuals.[4] In requesting that extension, respondent does not seek merely to place federal prisoners who reside in private correctional facilities in the *same* position as those residing in the BOP's own facilities. Rather, he asks the Court to extend *Bivens* to afford prisoners in private facilities an additional implied federal damages remedy that their counterparts in federally operated facilities do not possess.

That request should be denied. The rights of federal prisoners in BOP-operated facilities are adequately protected through, *inter alia*, the availability of two damages actions—a *Bivens* action against any *individual* officer who violates the prisoner's constitutional rights, and a statutorily conferred tort suit (subject to certain limits) against the government under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* As *FDIC* v. *Meyer*, 510 U.S. 471 (1994), makes clear, prisoners in BOP institutions have no *Bivens* action against the correctional facility or the BOP itself. The parties do not

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[4] For purposes of this case, we assume that CSC and its employees were, in relevant respects, acting under color of federal law. *Bivens* recognized an action against federal officers for violation of constitutional rights. If such an action lies against private individuals or entities, it can extend only to actions taken under color of federal law.

dispute that federal prisoners in private facilities may bring equivalent actions: a *Bivens* claim against the individuals responsible for the constitutional violation and a tort suit against the correctional entity that employed those individuals. The question before this Court is whether prisoners in private correctional facilities, unlike their governmentally housed counterparts, should also have an implied federal damages action against the correctional facility itself. They should not. There is no reason why federal prisoners in privately run institutions should enjoy an additional implied federal damages action that prisoners in governmental facilities do not possess. To the contrary, the damages remedies designed to serve deterrence and remedial goals in the context of government-operated facilities fulfill those same goals in private correctional institutions as well. There is neither need nor justification for the courts to infer an additional damages remedy in the absence of congressional action here.

A. This Court Does Not Lightly Extend The Limited Damages Remedy Recognized In *Bivens* Into New Contexts

1. In its 1971 decision in *Bivens* v. *Six Unknown Named Agents*, this Court recognized an implied private damages action under the Fourth Amendment against federal officers alleged to have violated a citizen's rights. In recognizing that implied damages action, the Court acknowledged that Congress had not specifically provided a damages remedy against federal officers for Fourth Amendment violations. 403 U.S. at 397. And the Court agreed that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation." *Id.* at 396. Nonetheless, relying on its earlier decisions recognizing implied private damages actions under federal statutes, see *id.* at 397 (citing *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)), the Court concluded

that it had authority to recognize such a remedy under the Fourth Amendment: "[W]here federally protected rights have been invaded," the Court stated, "it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 392 (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)); *id.* at 396 ("where legal rights have been invaded, * * * federal courts may use any available remedy to make good the wrong done") (internal quotation marks omitted).

The Court also concluded that a damages remedy would be appropriate in the Fourth Amendment context. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395. More importantly, the Court found no "special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. The case did not deal "with a question of 'federal fiscal policy.'" *Ibid.* (quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 311 (1947)). Nor was an implied cause of action inconsistent with an alternative remedial scheme established by Congress. *Id.* at 397.

Justice Harlan concurred in the judgment. Relying on the Court's then-existing cases inferring damages remedies "to effectuate statutory policies," 403 U.S. at 406; see also *id.* at 402 & n.4, Justice Harlan also viewed the question before the Court as "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Id.* at 407. In concluding that a damages action would be appropriate in the Fourth Amendment context, Justice Harlan emphasized that, because the government itself is immune from suit, an action for damages against an individual officer offered the only potential avenue for redress. "For people in Bivens' shoes," Justice Harlan stated, "it is damages or nothing." *Id.* at 410.

Although *Bivens* itself arose under the Fourth Amendment, in the following decade the Court relied on *Bivens* to recognize an implied damages remedy under the Due Pro-

cess Clause of the Fifth Amendment, *Davis* v. *Passman*, 442 U.S. 228 (1979), and the Cruel and Unusual Punishment Clause of the Eighth Amendment, *Carlson* v. *Green*, 446 U.S. 14 (1980). "In each of these cases, as in *Bivens* itself, the Court found that there were no 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Chilicky*, 487 U.S. at 421 (quoting *Bivens*, 403 U.S. at 396). See also *Carlson*, 446 U.S. at 18-20; *Davis*, 442 U.S. at 246-247.

2. This Court's "more recent decisions," however, "have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Chilicky*, 487 U.S. at 421. In *Bush* v. *Lucas*, 462 U.S. 367 (1983), for example, the Court declined to create a *Bivens*-like remedy against individual government officials for a First Amendment violation arising in the federal employment context. In that case, a federal employee claimed that he was demoted in violation of the First Amendment for making public statements critical of his employer. Concluding that the administrative review mechanisms crafted by Congress provided meaningful redress, the Court refused to create a damages action, even though it assumed a violation of the First Amendment and the absence of a complete remedy. *Id.* at 372-373, 386, 388. As this Court later observed, the Court in *Bush* relied on the fact "that the Legislature is far more competent than the Judiciary to carry out the necessary 'balancing [of] governmental efficiency and the rights of employees,'" and "refused to 'decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights.'" *Chilicky*, 487 U.S. at 423 (quoting *Bush*, 462 U.S. at 389, 390).

Two years later, in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), this Court reached a similar result in the military context. In that case, the Court refused to create a *Bivens* action against superior officers alleged to have injured enlisted personnel through unconstitutional conduct, even though the enlisted personnel had no remedy against the government itself. Noting the unique nature of military life, the Court again found "special factors counselling hesitation" in the absence of affirmative action by Congress. *Id.* at 298, 304. See also *United States* v. *Stanley*, 483 U.S. 669, 681 (1987) (disallowing *Bivens* actions by military personnel "whenever the injury arises out of activity 'incident to service'").

One year later, in *Chilicky*, the Court declined to rely on *Bivens* to infer a damages action against individual government employees alleged to have violated due process in their handling of social security disability benefits applications. Emphasizing that Congress had provided meaningful (albeit incomplete) remedies by statute, the Court observed that its recent decisions "have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." 487 U.S. at 421. In any event, the Court explained, "[t]he absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages." *Ibid.*

Most recently, in *FDIC* v. *Meyer*, *supra*, this Court declined to extend *Bivens* to permit suit against a federal agency, even though the agency—because Congress had waived its sovereign immunity—was otherwise amenable to suit. See 510 U.S. at 484-486. The Court emphasized that "the logic of *Bivens*" contemplates only a limited action against individuals, not against federal agencies. See *id.* at 485. The Court also observed that allowing a *Bivens* suit against an agency would undermine the deterrent effect that *Bivens* has on individual employees. If the Court "were to imply a damages action directly against federal agencies," the Court explained, "there would be no reason for aggrieved parties to bring damages actions against individual officers." *Ibid.* Finally, the Court noted the threat to federal fiscal interests: "If we were to recognize a direct action for

damages against federal agencies," the Court explained, "we would be creating a potentially enormous financial burden for the Federal Government." *Id.* at 486. Against that backdrop, the Court saw "special factors counselling hesitation" in the absence of affirmative action by Congress, *ibid.* (quoting *Bivens*, 403 U.S. at 396), and concluded that a cause of action against a federal agency should not be recognized absent express congressional direction, *ibid.*[5]

The considerations that informed the Court's refusal to extend the judicially created *Bivens* remedy in *FDIC* v. *Meyer* counsel the same result here. Respondent's claim, in

[5] This Court's increasingly cautious attitude toward recognition of additional implied damages actions for constitutional violations under *Bivens*' reasoning parallels the Court's increasing reluctance to establish or extend implied rights of action for statutory violations. At the time *Bivens* was decided, the Court had an expansive view of its authority to create causes of action to effectuate statutory goals, even absent any textual or structural basis for inferring that such a right of action was intended. "[I]t is the duty of the courts," the Court stated in *J.I. Case Co.* v. *Borak*, "to be alert to provide such remedies as are necessary to make effective the congressional purpose," 377 U.S. at 433. This Court "abandoned that understanding" of its role decades ago, and has declined to "revert" to "the understanding of private causes of action that held sway 40 years ago." *Alexander* v. *Sandoval*, 121 S. Ct. 1511, 1520 (2001). Instead, the Court now confines itself to "interpretation of the text and structure of the Act," *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994), to discern whether Congress meant not only to establish a right but also "to create the private remedy asserted," *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979). As the Court observed in *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979), "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Instead, the Court must "conclud[e] that Congress intended to make a remedy available to [that] special class of litigants." *Ibid.* See also *id.* at 717-718 (Rehnquist, J., concurring) ("I think the approach of the Court * * * is quite different from the analysis in earlier cases such as *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). * * * [F]ederal courts * * * must surely look to * * * whether there was an intent to create a private right of action.").

fact, rests on *two* proposed extensions of *Bivens*. First, although this Court has never held that private individuals acting under color of federal authority may be held liable under *Bivens*, both respondent and petitioner appear to assume that such an extension would be proper. For present purposes, we assume such an extension of *Bivens* is proper as well.[6] After all, if *Bivens* does not authorize an action against the *individuals* who directly commit the constitutional violation, *a fortiori* it does not authorize the imposition of damages on the *institution* that employed those individuals. Second, respondent urges the Court to extend *Bivens* liability further, beyond the individuals directly responsible for the constitutional deprivation, to the corporation for whom those individuals acted as agents. As we demonstrate below, that second extension of *Bivens* is not supported.

[6] The same rationales that supported the creation of a *Bivens* remedy against federal employees—deterring individuals from engaging in unconstitutional conduct, and ensuring the availability of a remedy separate and apart from state tort law, see pp. 18-23, *infra*—support the recognition of such a remedy against private individuals who violate constitutional rights under color of federal law. *Bivens* itself, moreover, provides no reason to distinguish between employees and non-employees who exercise federal authority. The Court's decision to recognize a federal cause of action in *Bivens* did not rest on the fact that the defendants there were formally employed by the United States; it rested on the fact that they exercised *federal power*. See 403 U.S. at 391-392. See also *id.* at 392 (Fourth Amendment guarantees "the absolute right to be free from unreasonable searches and seizures carried out *by virtue of federal authority*") (emphasis added). Of course, private-sector employees generally have greater exposure to state law claims and fewer immunities than their public-sector counterparts, which may lessen the imperative of inferring a constitutional cause of action.

B. The Deterrence and Remedial Rationales That Underlay The Creation Of A Damages Remedy In *Bivens* Do Not Support Creating A Damages Action Against Private Correctional Corporations

The *Bivens* cause of action is, in origin and by nature, a limited remedy against the individuals directly responsible for the constitutional deprivation. In *Bivens* itself the claimant "sued the agents of the Federal Bureau of Narcotics who allegedly violated his rights, not the Bureau itself." *Meyer*, 510 U.S. at 484. Similarly, the parties in this case do not dispute that respondent could have sued the individual CSC agents who allegedly violated his rights.[7] So long as claimants like respondent can bring a *Bivens* claim directly against the individuals responsible for a constitutional injury, the recognition of an additional implied damages action against the correctional institution is neither "'necessary' [n]or 'appropriate' to the vindication of" their interests. 403 U.S. at 407 (Harlan, J., concurring). To the contrary, as in *FDIC* v. *Meyer*, the "logic of *Bivens*" counsels against such an extension.

1. As an initial matter, this Court "implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." 510 U.S. at 485. As Justice Harlan observed in *Bivens*, "[f]or people in Bivens' shoes, it [wa]s damages" against the individual agents "or nothing." 403 U.S. at 410 (Harlan, J., concurring). Cf. *Carlson*, 446 U.S. at 22-23 (noting limitations on government's tort liability under the Federal Tort Claims Act). Here, in contrast, it is not damages against the corporate contractor or nothing. Instead, like the respondent in *Meyer*, respondent in this case by hypothesis can bring a *Bivens* action against the individuals directly responsible for his constitutional injury.[8] Respondent thus appears to ask the Court to do precisely what it properly declined to do in *Meyer*—"to imply a damages action based on a decision that presumed the *absence* of that very action." 510 U.S. at 485.

Respondent's proposed cause of action against the corporation, moreover, would tend to undermine the goal of individual deterrence on which the *Bivens* damages remedy rests. "It must be remembered," this Court stated in *Meyer*, "that the purpose of *Bivens* is to deter *the officer*." 510 U.S. at 485.[9] In *Meyer*, the Court concluded that recognizing an implied damages action directly against the agency might leave aggrieved parties "no reason * * * to bring damages actions against individual officers. Under [such a] regime, the deterrent effects of the *Bivens* remedy" on individual officers "would be lost." *Ibid.* The same reasoning applies here as well. Here, as in *Meyer*, providing a damages action against the corporate employer would undermine the incentive for aggrieved parties to sue the individual directly responsible for their constitutional injuries. Consequently, here, as in *Meyer*, the "provision of a damages remedy against a private entity would actively diminish the deter-

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[7] In fact, respondent did sue one of the individuals, Urena, under *Bivens*. Two years after filing the initial complaint, respondent sought to amend it to name Urena as a defendant. Respondent's decision to amend the complaint to name Urena as a defendant, however, came after the statute of limitations had run. Because the proposed amendment did not "relate back" to the original filing date of the complaint under Federal Rule of Civil Procedure 15(c), the district court and court of appeals both concluded that the claim against Urena was barred by the statute of limitations. See Pet. App. 15a-18a, 22a-24a.

[8] In addition, respondent could have brought a common-law tort action against the responsible individuals and the correctional corporation that employed them. Cf. *Meyer*, 510 U.S. at 485 n.10.

[9] This is not to suggest that the *Bivens* remedy is perfectly calibrated to achieve optimal deterrence. But the goal of deterrence has been, from the outset, one of the principal rationales underlying *Bivens* and its progeny.

rent value of the remedy against the individual." *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1227 (D.C. Cir. 1994). For that very reason, the D.C. Circuit has observed:

> If such additional [corporate] defendants were available (often with deeper pockets than the individual offenders), plaintiffs might make the same choice as the Kauffmans, who brought their *Bivens* actions *only* against the private entity and not against the individual[s]. * * * To the extent that plaintiffs make such choices with any regularity, *Meyer* indicates that the deterrent effect of the *Bivens* remedy would be weakened. In sum, on *Meyer*'s deterrence rationale there is no affirmative reason to recognize *Bivens* actions against private entities, and there is some reason *not* to do so.

Ibid.[10]

[10] In *Meyer*, the Court expressed concern that plaintiffs would have a special incentive to sue the agency but not the individuals. In particular, the Court explained, such a strategy would permit plaintiffs to avoid the individual officer's qualified immunity defense. 510 U.S. at 485. That specific concern, of course, may not be present here; this case does not involve qualified immunity, and private prison guards may not enjoy the same qualified immunity protection as government employees. See *Richardson* v. *McKnight*, 521 U.S. 399 (1997). But there remains a significant incentive to bypass suit against—and thus diminish the deterrent effect on—the individual officer. Rather than risk suit against potentially sympathetic individual defendants with limited resources, plaintiffs may well prefer to bring suit against an abstract corporate defendant with ample resources and little claim to the sympathies of the jury. Indeed, it is well documented that corporations fare worse before juries than do individuals. See Chin & Peterson, *Deep Pockets, Empty Pockets* at vii, 43 (1985) (Rand Institute for Civil Justice study indicating that corporate defendants typically must pay awards that are "30 percent more than what an individual defendant would pay in the same case," and that they pay 4.4 times as much if the case involves a serious injury; also noting that, in some categories of cases, corporations are more likely to be found liable in the first place); Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Hum. Behav. 151, 162 (1989) (experiments indicating that jurors treat corporations less favorably); MacCoun, *Differential Treatment of Corporate Defendants By Juries*, 30 L. & Soc'y Rev. 121, 140 (1996) ("corporations were indeed treated differently"). See also *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality) (noting "the risk that" awards may be "influenced by prejudice against large corporations"); *id.* at 490-492 (O'Connor, J., dissenting) (tracing similar concerns through history).

2. The court of appeals' initial response was to discount the importance of the deterrence rationale and declare that "an extension of [*Bivens*] liability [is] warranted" in this context "even absent a substantial deterrent effect in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations." Pet. App. 10a.[11] That assertion is mistaken in law and fact. First, as a matter of law, this Court has explained that "the purpose of *Bivens* is to deter *the officer*," *Meyer*, 510 U.S. at 485, and that "[t]he absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages," *Chilicky*, 487 U.S. at

[11] The court of appeals speculated that corporate liability would promote *Bivens*' deterrent goal because "an employer facing exposure to * * * liability would be motivated to prevent unlawful acts by its employees," Pet. App. 11a, but that is the analysis this Court rejected in *Meyer*. Recognizing a cause of action against the corporate employer shifts the burdens of standing trial and (in cases where the agents and officers err) providing compensation from the individual agents and officers themselves to the corporation and its shareholders. As this Court observed in *Meyer*, 510 U.S. at 485, and as explained above, pp. 19-20, *supra*, that shift *decreases* the deterrent effect on the *individual* agents and officers that *Bivens* attempts to create. Moreover, a corporation "can only act through its agents and officers." *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 495 (1909). Consequently, so long as all of the corporation's *agents* and *officers*—the corporation's decision- and policy-makers—confront potential personal liability for constitutional deprivations, anyone who could cause the corporation to act unconstitutionally should, by *Bivens*' rationale, be deterred from doing so by the prospect of individual liability under *Bivens*.

421. Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979) ("As our recent cases * * * demonstrate, the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."). This Court's qualified immunity decisions, moreover, belie the notion that *Bivens* rests on a need to ensure that there is a monetary remedy for all constitutional injuries. Those decisions recognize that, even where government officers violate the Constitution, society's need for decisive action by government officers will often counsel against providing a monetary remedy.[12]

Second, the court of appeals' suggestion that it is appropriate to extend *Bivens* in this context to "provid[e] a remedy," Pet. App. 10a, is mistaken as a matter of fact. Even if one were to assume (contrary to *Chilicky*'s observation) that the absence of other remedies would by itself necessarily justify the creation of an implied cause of action, that hypothetical circumstance does not exist here. Simply put, inmates in private institutions already have remedies—remedies that parallel those available to (and adequate for) their publicly housed counterparts. "For people in [respondent's] shoes, it is" *not* "damages" against the corporation "or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring); *Passman*, 442 U.S. at 245 ("For Davis, as for Bivens, 'it is damages or nothing,'" since "there are available no other alternative forms of judicial relief."). To the contrary, the parties do not dispute that respondent had a *Bivens* action against the *individuals* who violated his constitutional rights. See pp. 17, 18 & note 6, *supra*. Nor do they dispute that respondent had a state tort action against both the

[12] As this Court has explained, "[q]ualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992) (citations omitted). This case, of course, does not involve any qualified immunity questions.

individual defendants and the corporation. See p. 19 note 8, *supra*; p. 24 note 14, *infra*. Respondent thus does not seek merely to ensure the availability of remedies; rather, he seeks their multiplication.

In so doing, respondent seeks to provide federal prisoners in privately run institutions with a federal damages action that their counterparts in BOP-operated institutions lack. A federal prisoner housed in a BOP facility who suffers a constitutional deprivation has a *Bivens* remedy against the individual employee involved, subject to the defense of qualified immunity. As *Meyer* makes clear, however, a BOP-housed inmate has no *Bivens* remedy against that individual's employer, the United States and the BOP. With respect to the constitutional deprivation, his only remedy lies against the offending individual, a remedy *Meyer* found to be sufficient. See 510 U.S. at 485-486. Respondent nonetheless asks the Court to permit prisoners in private facilities to bring an implied federal damages action against not only the individual responsible for the violation (perhaps without a qualified immunity defense) but also his employer—the correctional institution—which is precisely what BOP-housed inmates cannot do. There is nothing in *Bivens* to suggest that federal prisoners housed in *private* contract facilities should have a federal cause of action that is not available to their governmentally housed counterparts. To the contrary, just as a potential *Bivens* action against the responsible individual, and a claim based on state tort law against the institution, are sufficient for inmates housed in BOP facilities, they are sufficient for inmates in contract facilities. That is particularly true because, even without the federal corporate liability that respondent demands, prisoners in privately run institutions in many respects have a superior *Bivens* remedy compared to their federally housed

counterparts,[13] a more extensive tort remedy,[14] and equal access to remedial mechanisms such as suits for injunctive relief and grievances filed through the BOP's Administrative Remedy Program.[15]

Finally, the court of appeals ignored the special status of the private for-profit and not-for-profit entities that contract with the Bureau in this context. To the extent those entities

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[13] Prisoners in federally operated facilities must, as part of their *Bivens* action, overcome the prison guards' defense of qualified immunity; prisoners in private facilities presumably do not. *Richardson* v. *McKnight*, *supra* (holding that private-sector prison guards acting under color of state law do not enjoy qualified immunity under 42 U.S.C. 1983).

[14] A prisoner confined in a privately run facility may bring a tort suit against the facility directly under state law. A federal prisoner, in contrast, is confined to suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, which generally incorporates the tort law of the State in which injury occurs, but creates numerous exceptions. In particular, the FTCA provides that the United States "shall be liable, respecting * * * [certain] tort claims, in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, subject to certain procedural requirements, 28 U.S.C. 2675, and exceptions, such as the discretionary function exception, 28 U.S.C. 2680(a), and an exclusion for certain intentional torts, 28 U.S.C. 2680(h). In addition, the FTCA bars jury trials, 28 U.S.C. 2402, and awards of punitive damages and interest, 28 U.S.C. 2674. Thus, although both a prisoner in a private facility and in a federally operated facility have, in theory, a remedy grounded in local state tort law, prisoners in private facilities are not subject to the limits, exclusions, and procedural requirements imposed by the FTCA.

[15] Like inmates "confined in institutions operated by the Bureau of Prisons, * * * inmates designated to contract Community Corrections Centers" may invoke the Bureau's "Administrative Remedy Program," a "process through which inmates may seek formal review of an issue which relates to any aspect of their confinement." 28 C.F.R. 542.10. See also 28 C.F.R. 542.12 (excluding certain matters, which are subject to an alternative procedural mechanism, from the grievance mechanism). Once a complaint is filed, the Community Corrections Manager, Warden, Regional Director, and General Counsel are responsible for ensuring that complaints are properly investigated. 28 C.F.R. 542.11.

exercise federal authority, they exercise that authority on behalf of—they stand in the shoes of—the BOP itself in pursuit of the Bureau's penological mission. The BOP does not itself confront *Bivens* liability for the conduct of the agents through whom it pursues that mission; nor should the not-for-profit and for-profit corporations to whom the BOP contractually delegates its important duties. That is especially true in light of the oversight and enforcement role the BOP retains when it delegates its authority. The Bureau continues protecting prisoners in Community Corrections Centers by, among other things, making its administrative grievance process available to them. See p. 24 & note 14, *supra*. And it oversees the Community Corrections Centers themselves through extensive contract monitoring and performance evaluation, as provided in the *Community Corrections Manual*, to ensure that such facilities meet contract goals and provide federal prisoners with the quality care and support they require during their transition from confinement to liberty. See p. 4, *supra* (describing oversight and inspections). The BOP's current *Statement of Work*—the model contract that provides the minimum requirements for Community Corrections Centers—contains 24 chapters and spans 108 pages. It covers requirements that range from staff training and qualification, to facilities, to food, to employment counseling and assistance. See p. 4, *supra*. That extensive oversight makes it particularly difficult to justify a differential rule for BOP-regulated and BOP-operated institutions.

Indeed, the BOP's extensive administrative and contractual oversight provide an additional source of deterrence that obviates the need to create further *Bivens*-like liability. While the BOP's oversight may not be able to ensure that each individual employee always observes constitutional norms, the oversight can ensure that the corporation itself complies with the BOP's regulations and avoids systematic practices or policies that violate the Constitution. The

combination of BOP oversight over the corporation, individual officer liability under *Bivens*, and potential tort liability under state law leaves no remedial gap to be filled through the judicial creation of a further remedy.

C. Expansion Of Judicially Created Liability Is Particularly Inappropriate In Light Of Express Congressional Policy

The court of appeals acknowledged that judicial expansion of *Bivens* liability would affect federal fiscal interests, because contracting parties subjected to direct *Bivens* liability would pass on those additional expenses to the government. Pet. App. 11a. However, the court discounted that effect because it read this Court's decision in *Meyer* as focusing only on the impact of "imposing *Bivens* liability directly upon federal agencies." *Ibid.* That truncated analysis of the effect of increased liability was not sufficient. This Court's "*Bivens* line of cases reflect a sensitivity to varying contexts," and "[t]he range of concerns" that may be taken into account is "broad." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 280 (1997). See also 403 U.S. at 407 (Harlan, J., concurring) (noting the "broad" range "of policy considerations" the Court "may take into account"). In this context, the increased liability contemplated by the court of appeals would place inappropriate burdens on important federal programs and improperly skew government decisionmaking.

Here, as in other contexts, "[t]he financial burden of judgments against" government contractors "would ultimately be passed through, substantially if not totally, to the United States itself, since * * * contractors will predictably raise their prices to cover, or to insure against" liability. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 511-512 (1988). But here, unlike some other contexts, the increased costs to the government are of particular concern, and not merely because they represent a drain on the Treasury. For the past

two decades, all Community Corrections Centers have been operated by private contractors, and not the BOP. In 1984, Congress nonetheless established an express policy, embodied in 18 U.S.C. 3624(c), that "to the extent practicable" prisoners serve a "reasonable part" of the last ten percent of their sentences (but no more than six months) in such environments, to "afford [them] a reasonable opportunity to adjust to and prepare for * * * re-entry into the community." In an era of limited budgets, a judicial decision that increases the cost of placing inmates in Community Corrections Centers may affect the extent to which it is "practicable" to achieve Section 3624(c)'s goal: The BOP could be forced either to acquire its own community-based facilities or to reduce the period of time prisoners spend in such facilities, with a corresponding increase in the time prisoners must spend in already over-capacity but mostly government-run (and hence less costly) secure facilities.[16] The broad range of concerns the Court may consider when deciding whether to extend *Bivens* surely encompasses the potential adverse impact on such an important federal program—a program associated with a 35% reduction in recidivism, Saylor & Gaes, *Training Inmates Through Industrial Work Participation and Vocational and Apprenticeship Instruction*, 1 Corrections Mgmt. Q. 32, 39-40 (1997)—and on the efficient operation of the prison system generally. The Court should be particularly hesitant to extend a judicially created remedy where, as here, the resulting financial burden has the potential of impeding an explicit congressional policy.

In addition, a more expansive *Bivens* remedy on the part of privately housed prisoners would distort the govern-

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[16] The BOP advises that, even without the imposition of *Bivens*-like liability on contractors, the marginal cost of housing an additional inmate in existing secure facilities is lower than the cost of placing that inmate in a Community Corrections Center.

ment's decisions regarding whether and under what circumstances to contract with private providers for the housing of federal prisoners. Congress has consistently expressed a policy of including private facilities among the available options for prisoner housing. See, *e.g.*, National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, Subtit. C, § 11201(c), 111 Stat. 734, as modified, D.C. Appropriations Act of 2001, Pub. L. No. 106-553, § 115, 114 Stat. 2762A-68 (42 U.S.C. 4001 note). In determining whether to use public or private facilities for particular prisoners or functions, the government to date has appropriately focused on considerations of quality and efficiency—that is, the cost and quality of the confinement facilities and program support for the inmate population. This Court should not distort that calculus by imposing additional costs in the form of corporate liability on private facilities alone.

D. The Court Of Appeals' Reliance On 42 U.S.C. 1983 Was Misplaced

Finally, the court of appeals' decision to create a *Bivens*-like damages remedy against private correctional corporations was "influenced strongly" by the fact that liability under 42 U.S.C. 1983 extends to private corporations acting under color of state law. Pet. App. 12a (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982)). That reliance on Section 1983, however, was misplaced. The damages remedy under Section 1983 was created by Congress, and the scope of liability under it is therefore a question of statutory construction. Consequently, when this Court construed that statute as creating limited liability for municipal corporations in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), the Court relied on Section 1983's language and unique legislative history. In particular, the Court emphasized Section 1983's imposition of liability on any "person"—a term that has been understood to include legal persons like

corporations. *Id.* at 688-689. Moreover, as the Court explained, the text of Section 1983 provides an express standard of vicarious liability. It creates a cause of action not only against anyone who "subject[s] another" to a constitutional deprivation, but also against anyone who "cause[s]" another "to be subjected" to such a deprivation. *Id.* at 690-692. Viewing that language in light of Section 1983's legislative history, the Court interpreted Section 1983 as rendering municipalities liable for the constitutional deprivations they "cause"—*i.e.*, those deprivations committed by municipal agents pursuant to an "official policy." *Id.* at 691-692. Following that decision, the lower federal courts have similarly concluded that private corporations engaging in state action may be liable under Section 1983 to the extent the deprivation results from the corporation's unconstitutional policies. See, *e.g.*, *Austin* v. *Paramount Parks, Inc.*, 195 F.3d 715, 727-728 (4th Cir. 1999); *Sanders* v. *Sears, Roebuck & Co.*, 984 F.2d 972, 975-976 (8th Cir. 1993); *Rojas* v. *Alexander's Dep't Store, Inc.*, 924 F.2d 406, 408 (2d Cir. 1990), cert. denied, 502 U.S. 809 (1991); *Iskander* v. *Village of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982). See also *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-937 (1982).

That reasoning, however, has no place under *Bivens*. The damages action against federal officers recognized by *Bivens* was judicially inferred to fill a perceived remedial gap and to enforce a constitutional mandate. While it bears some resemblance to the remedy against state officers that Congress provided in Section 1983, this Court's decision in *Meyer* implicitly rejected the claim that *Bivens* and Section 1983 actions are precisely parallel. In *Meyer*, the Court refused to infer a cause of action against a federal agency notwithstanding *Monell*'s recognition that local government agencies can be liable under Section 1983. The statutory language and legislative history that informed *Monell* were irrelevant in *Meyer*—and are similarly irrelevant here—because the *Bivens* remedy is founded not on an Act

of Congress but on a judicial decision.[17] Consequently, when this Court decides whether to create or extend *Bivens* liability, it does not consult statutory text; instead, the Court consults the same policy considerations that underlay *Bivens* itself. See 403 U.S. at 407 (Harlan, J., concurring) ("The range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization."). As explained above, those policy considerations do not support creating a *Bivens* remedy against private correctional institutions in this context. See pp. 18-28, *supra*. Accordingly, the Court should decline to extend *Bivens*, just as it did in *Meyer*, 510 U.S. at 484-486; in *Chilicky*, 487 U.S. at 423; in *Chappell*, 462 U.S. at 298, and in *Bush*, 462 U.S. at 377.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[17] Of course, this Court has held that the scope of immunity defenses under *Bivens* is the same as under Section 1983. See, *e.g.*, *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). But this case does not concern immunity; it concerns the scope of the *Bivens* remedy itself.